



Terry Tamminen
Agency Secretary

Air Resources Board

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Chairman

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Arnold Schwarzenegger
Governor

May 11, 2004

Kenneth L. Glick, Counsel
Legal Division
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, California 95814

RE: Conflict of Interest Regulations: Standards of Care

Dear Mr. Glick:

Thank you for providing the opportunity for us to comment on the proposal to add a "standard of care" requirement to the conflict of interest provisions of the Political Reform Act ("the Act," Govt. Code sections 87100, et seq.).

As we know, the Act prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official "knows or has reason to know" he or she has a financial interest. (Govt. Code section 87100.) The Act provides that a public official has a financial interest in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on one or more of the official's economic interests. (Govt. Code section 87103.)

B. Standards of Care

Fair Political Practices Commission ("Commission") staff is seeking public comment as to whether the Commission should adopt a regulation that sets forth standards of care public officials should follow in complying with the conflict-of-interest provisions of the Act. The Air Resources Board (ARB) was unable to participate in the March meeting, but would like to respond to the issues raised in the notice as follows.

** Is there a need to adopt a regulation setting forth standards of care?*

The ARB has not found the absence of a standard of care to be problematic. Adopting a bright-line standard of care may end up causing more problems than it solves. It makes more sense to view each case according to the totality of the circumstances.

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Website: <http://www.arb.ca.gov>.

California Environmental Protection Agency

** What are the factors, if present, that would indicate that a public official knows or has reason to know that a governmental decision may be one in which the official has a financial interest?*

A person should be presumed to know about his or her sources of income. We would be concerned about any standard that allows an excuse based on ignorance. Most public officials to whom the Act applies must file income tax returns, and at a minimum should know what sources of income are listed there. Similarly, public officials whose business requires a license or permit must be deemed aware of that business and its income.

** In the absence of actual knowledge, does the Act impose a duty on a public official to determine whether he or she has reason to know that a governmental decision may be one in which the official has a financial interest?*

Yes.

** If the Act does impose the duty described above on a public official, is it possible to adopt standards which, if followed, would satisfy this duty?*

As noted above, adopting a bright-line standard of care may end up causing more problems than it solves. It makes more sense to view each case according to the totality of the circumstances.

** What legal consequences should result from complying, or failing to comply, with these standards?*

The legal consequences should reflect the severity of the failure to comply. While we believe that the Act imposes a duty that rises almost to the level of strict liability, any penalty should reflect the totality of the circumstances, and whether there are aggravating or mitigating factors. Aggravating factors might include an intentional omission or an obvious intent to conceal or deceive. Mitigating factors might include personal issues (e.g., the financial interests at issue are in contention in a marital dissolution), a good-faith attempt to be thorough, a showing of due diligence. The extent of the omission or failure to comply should also be taken into account: Is it a relatively small payment from a nearly-forgotten trust, or \$250,000 from the official's sole proprietorship? In addition, officials to whom the Act applies vary widely in their levels of sophistication, and it may not be fair to hold a member of a rural community

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services district to the same standard as a wealthy suburban developer who has teams of lawyers at her disposal.

** If standards of care are adopted, in what context may they be applied? For instance, should those standards be applicable only in the context of enforcement proceedings (e.g., as a potential affirmative defense available to a public official)? Or should these standards be inapplicable in the enforcement context, but apply only to assist a public official in identifying a disqualifying conflict of interest? Should those standards apply in both contexts?*

If standards of care were adopted, assisting a public official in identifying a disqualifying conflict of interest should be the more important consideration and application. The goal of the Act is to promote disclosure so that the public's business may be conducted fairly and properly.

We understand that this matter is at a preliminary stage and that Commission staff has yet to arrive at any conclusions regarding the need for, purpose, or content of standards of care. We would hope that the ARB would be notified of future informational meetings and opportunities to comment.

If you have any questions regarding these comments, please contact ARB Staff Counsel Victoria Davis by phone at (916) 445-6426 or by e-mail at vdavis@arb.ca.gov.

Sincerely,

A handwritten signature in black ink, reading "Diane Moritz Johnston". The signature is fluid and cursive, with the first name "Diane" and last name "Johnston" being more prominent than the middle name "Moritz".

Diane Moritz Johnston
General Counsel

cc: Victoria Davis
Staff Attorney